No. 79027-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 55342-9-I

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent/Cross-Petitioner,

v.

DAN PAULSON CONSTRUCTION, INC., a Washington corporation, KAREN and JOSEPH MARTINELLI, and the marital community composed thereof,

Petitioners/Cross-Respondents.

PETITIONERS/CROSS-RESPONDENTS' REPLY IN SUPPORT OF MOTION TO STRIKE NEW ISSUE RASIED FOR THE FIRST TIME IN RESPONDENTS' SUPPLEMENTAL BRIEF

Law Offices of Robert B. Gould
Robert B. Gould, WSBA No. 4353
Brian J. Waid, WSBA No. 26038
2110 N. Pacific Street, Suite 100
Seattle, WA 98103-9181
(206) 633-4442
Attorneys for Petitioners/Cross-Respondents
Karen and Joseph Martinelli

Mutual of Enumclaw concedes it did not raise its "unclean hands" defense in any lower court. It further concedes that the trial court rejected its cooperation clause argument and it abandoned that issue on appeal. It thus concedes that its Supplemental Brief violates RAP 2.5(a) and RAP 13.7(a), (b), and (c). MOE nevertheless insists the Court must overlook its violations of these Rules because consideration of whether "improper conduct by an insured should preclude coverage by estoppel" is "necessary to reach a proper decision." MOE Resp. to Mot. to Strike, p. 2.[1]

No necessity exists. What, specifically, is the "gamesmanship" or "improper conduct" to which Mutual of Enumclaw refers? MOE does not say. The trial court specifically concluded that there was *no* fraud or collusion in the settlement between Paulson and the Martinellis. CP 689-90. MOE has not challenged that conclusion on appeal. On many occasions over many years, this Court has approved the use of covenant judgments. See, Pet. Supp. Br., p. 17. Moreover, Paulson had every right to settle the case because, "[b]y issuing a reservation, an insurer empowers

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1 Like amicus WDLT, Mutual of Enumclaw's Response implies ("uninsured million dollar claims") that all or most of the covenant judgment is uninsured. Resp., p. 4. MOE's innuendo is quite misleading. The record shows claims totaling $2.3-2.67MM, *much* of which clearly *falls within coverage.* See, CP 38-40 and Resp. Br. in Court of Appeals, pp. 5-6, and 12, for detailed Record references.

its insured to settle the claim independently, immediately, and without any direct notice to the insurer." T. Harris, *Washington Insurance Law,* §17.7, p. 17-16 (2d ed. 2006), *citing, Evans v. Continental Casualty Co.,* 40 Wn.2d 614, 627-30, 245 P.2d 470 (1952). Accordingly, the fact that Paulson entered into a settlement that includes a covenant judgment could *not* possibly represent "gamesmanship" or "improper conduct," as a matter of Washington law.

Furthermore, the insured's right to control the reservation of rights defense includes the right to seek an undifferentiated judgment. Harris, *supra,* §17.8, p. 17-17. Thus, the mere fact that Paulson (through its counsel assigned by MOE) chose to seek an undifferentiated arbitration award could *not* represent "gamesmanship" or "improper conduct," as a matter of Washington law. Furthermore, *Mutual of Enumclaw's own coverage counsel admitted, under oath, that Paulson and the Martinellis* ***fully*** *cooperated with Mutual of Enumclaw's requests for information* and the trial court so held. CP 649, 971-2. See, Pet. Mot. to Strike, pp. 3-4; Resp. Br. in Court of Appeals, p. 7 (for additional Record references).

CONCLUSION

Mutual of Enumclaw's Supplemental Brief violates this Court's rules. It did *not* raise the "unclean hands" defense in the lower courts. Moreover, the trial court rejected its cooperation clause defense, which Mutual of Enumclaw then abandoned on appeal. The fact that Mutual of Enumclaw would have had a remedy at law *if* the insured had breached the cooperation clause, also defeats its equitable defense, because "equity will not intervene where there is an adequate remedy at law." *Sorensen v. Pyeatt,* 158 Wn.2d 523, 542-43, 146 P.3d 1172 (2006). Finally, there is also no necessity to consider Mutual of Enumclaw's "gamesmanship" or "improper conduct" arguments for the simple reason that they are legally irrelevant on the undisputed facts of this appeal. The Court should therefore grant Petitioners' Motion to Strike.

Respectfully submitted this 25th day of May, 2007.

LAW OFFICES OF ROBERT B. GOULD

By: _____

Robert B. Gould, WSBA No 4353
Brian J. Waid, WSBA No. 26038
Attorneys for Petitioners/Cross-Respondents Karen and Joseph Martinelli

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